IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 467 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANTUBHAI APBHAI KATHI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 467 of 2002
MR NITIN M AMIN for Appellant No.
MR RC KODEKAR Ld. APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 04/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. Both the appellants were charged of committing the offences under sec. 302, 504 read with sec. 114 IPC for committing the murder of Khetabhai Ghanabhai Bharavad by the ld. Addl. Sessions Judge, Surendranagar. The appellant no. 2 was also charged of the offence punishable under sec. 506(2) of IPC. The appellant no. 1 was also charged of the offence punishable under sec. 135 of the Bombay Police Act. The ld. trial judge at the end of the trial, by his judgment and order dated 8.4.2002 passed in Sessions Case No. 75/1999 convicted the appellant no. 1 under secs. 304(1) and 504 of IPC and under sec. 135 of the Bombay Police Act and was sentenced to undergo R/I for 10 years and fine of Rs. 5000/-, in default, to undergo S/I for 2 years of the offence punishable under sec. 304(1) of IPC.

For the offence punishable under sec. 504 appellant no. 1 was sentenced to suffer R/I for 6 months and a fine of Rs. 500/-, in default, to undergo S/I for two months; and for the offence punishable under sec. 135 of the Bombay Police Act, appellant no. 1 was sentenced to suffer 6 months S/I and fine of Rs. 500/-, in default, to under go S/I for two months.

The appellant no. 2 was convicted of the offence punishable under sec. 506(2) of IPC and under sec. 135 of the Bombay Police Act and was sentenced to suffer 3 years R/i and a fine of Rs. 1000/-, in default, to undergo 6 months S/I. For the offence punishable under sec. 135 of the Bombay Police Act, he was sentenced to suffer R/I for 6 months and fine of Rs. 500/-, in default, to undergo S/I for two months. The appellants were ordered to undergo the sentences concurrently.

2. The appellants have challenged the said judgment and order of conviction and sentence in the present appeal.

3. The incident in question had taken place on 30.7.1999 in the morning at 7.00 hrs. at the out-skirt of village Nagadaka. The deceased Khetabhai Ghanabhai used to graze the buffalos of Shepherds of the village. On the said date, when deceased was going to graze the buffalos, the appellants told the deceased that as to why he was taking the cattle of their enemies for grazing and why he was not taking the buffalo of the appellants. They also gave abuses to the deceased. When deceased

asked them not to utter abuses, the appellant no. 1 gave a stick blow on the head of Khetabhai Dhanabhai resulting serious injuries on the head. As many persons started gathering there, the accused left the place. While leaving the place, appellant no. 2 gave a threat that he is survived this time, however, on the next occasion, he would be killed.

Injured Khetabhai was taken in a Jeep car by his cousin Savabhai Kanabhai to C. U. Shah Medical Centre, Surendranagar, where, he was examined by Dr. Salil Pravinchandra Kharod. As per his advise, for further treatment, the injured was transferred to V.S. Hospital, Ahmedabad. The deceased succumbed to the injuries sustained by him at V.S. Hospital, Ahmedabad at 7.45a.m. on the next day.

4. On the basis of the information conveyed by Dr. Kharod to Surendranagar City Police Station, the investigation commenced. As the offence was committed within the jurisdiction of Sayala Police Station, P.S.I. Mr. Joshi carried out the formal investigation. After collecting sufficient material against the accused, the charge-sheet came to be filed against both the appellants before the ld. Judicial Magistrate First Class, Sayala, who in turn, committed the case to the Court of Sessions at Surendranagar as the offence under sec. 302 is exclusively triable by the Court of Sessions.

5. The ld. Addl. Sessions Judge framed the charge at ex. 1 against both the appellants for the offences punishable under sec. 302, 504 read with section 114 of IPC and under sec. 506(2) against the appellant no. 2. The appellants pleaded not guilty and claimed to be tried.

6. The prosecution led oral as well as documentary evidence against the appellants. The appellants, in their further statement under sec. 313 of CrPC have stated while denying the prosecution evidence that they have been falsely involved in the case. The ld. trial judge after appreciating the oral as well as documentary evidence was of the view that the prosecution has established the involvement of both the appellants in the offences in question. However, according to the ld. Judge the appellants have not committed the offence under sec. 302 read with sec. 114 of IPC. He accordingly, convicted the A1 for the offence punishable under sec. 304 Part-I and under sec. 504 of IPC. A2 was convicted for the offence under sec. 506(2) IPC. Hence, the present appeal.

7. We have heard Mr. NM Amin ld. advocate for the appellants and Mr. RC Kodekar ld. APP for the respondent-State. We have also gone through the entire evidence.

8. Mr. Amin submitted that the trial court has committed a serious error in convicting both the appellants relying on the evidence of prosecution witnesses. He has submitted that the evidence of complainant Savabhai as well as Ruda Mera and Lagharabhai, is not at all believable. He has submitted that they are closed relatives of the deceased and, therefore, highly interested witnesses. He has further submitted that in view of material discrepancies in the evidence, none of the PWs is reliable witnesses. According to him, even though the incident happened in the residential locality where many persons were there, no independent person is examined and, therefore, no conviction can be based relying on the evidence of highly interested witnesses. He further submitted that even though PWs had many opportunities to lodge the complaint, but no complaint was filed immediately after the incident. According to him, even though the incident happened in the morning at 7.00a.m. on 30.7.1999, the complaint was registered at 0.30 hrs. of 31.7.1999. Thus, this long unexplained delay of almost 17 hours, the complainant has, in connivance with the police, falsely involved both the appellants. Ld. advocate Mr. Amin, therefore, submitted that the appeal is required to be allowed.

9. Mr. RC Kodekar ld. APP on the other hand, supported the judgment of the trial court in toto.

10. PW-1 Savabhai Kanabhai Bharvad Ex. 22, is the complainant in the present case. According to him, incident had happened in the morning at 8.00a.m. At that time, he was going to the house of Akabhai, who is his co-sharer of the field. At that time, he saw A1 -Shantubhai Apbhai Kathi and A2 - Ramkubhai Apbhai Kathi coming from the opposite direction. A1 was having an iron pipe, while A2 was having stick. In his evidence, he narrated the fact which led to the quarrel between the deceased and the appellants. According to him, Khetabhai was used to take the cow of A1 for grazing. It was difficult for the deceased to control the cow as the cow after leaving him, used to return to the house of A1. Because of this, A1 enquired from the deceased that as to why the cow returns, to which, he (deceased) answered that he is unable to control the cow. Deceased also

advised that the cow may be tied at home for two days and/or a wooden log be tied between four legs of the cow. A1 was not prepared to accept the advise. He asked the deceased to take the cow otherwise he would be beaten. A1 also uttered filthy abuses. Deceased thereafter told A1 that he was not prepared to do the work of grazing his cow and let the cow be tied at home. On hearing this, A1 inflicted iron pipe blow on the head of the deceased. On getting the blow, deceased fell down on the ground without uttering a word. As he reached the spot, both the accused ran away. PW1 tried to make Kheta stand, however, he could not stand. PW1 thereafter arranged for the Jeep Car to shift Khetabhai to the hospital. He was taken to the Hospital, at Surendranagar. Doctor after examining him advised to take the deceased to Ahmedabad. Even though Khetabhai was breathing, he was unconscious. At V.S. Hospital, Ahmedabad also, Khetabhai remained unconscious. He died at 1.00 O'clock at the same night.

This witness has been cross-examined by the defence. The defence has successfully brought out material contradictions in his evidence. He has admitted that deceased Khetabhai was his cousin brother. He has also admitted that PW-7 Rudabhai Merabhai also belonged to his caste. He has further admitted that his father and father of deceased Khetabhai are real brother. Both the families are residing adjacent to each other. He had gone in the Jeep car in a company of Rudabhai Merabhai after informing about the entire incident to one Khodabhai Ghoghabhai to file complaint. He had not given names of assailants to the persons gathered. On his way, he had taken deceased at Sudamada dispensary. He has admitted that on the way, there was also a dispensary at Sayala and there was a police-line on the way. He informed the doctor at Surendranagar hospital that a quarrel had taken place due to grazing of cow. According to him, they reached at Surendranagar at about 10.00am to 11.00am and left the Surendranagar hospital after 30 minutes for Ahmedabad. According to him, police saw him at Surendranagar hospital and enquired. He gave the complaint to the police which was taken down as stated by him and was also read over to him. He has denied the suggestion that he was contradicted with the fact that he has not stated in the complaint that A1 was having iron pipe and A1 gave blow with the iron pipe. He was also contradicted with the statement made by him in the complaint, wherein, he has not stated that both the appellants were coming from the opposite direction. He has also denied the suggestion that he has not stated the fact in the complaint that deceased was grazing the cow of A1. Not only that, he has denied the fact of giving

the entire facts leading to the quarrel between A1 and the deceased in the complaint. According to him, even though he ran after the appellants, however, he could not catch them. He saw the incident from the distance of 30ft. He has admitted that one Vela Masharu - nephew of Khetabhai Dhanabhai also came at the spot when he brought Jeep Car for the purpose of carrying the injured to the hospital, however, Vela Masharu did not accompany them. According to this witness, he did not think it proper to send Vela Masharu or any other person at the residence of Khetabhai to inform the family members. However, all the family members came at Surendranagar hospital. All the family members came 15 to 20 minutes after this witness reached Surendranagar. According to him, deceased was accompanied by this witness as well as Laghara Masharu and Ruda Mera to Ahmedabad. They all reached at Ahmedabad at about 4.00p.m. or 5.00pm. He has specifically stated that he did not remember at what time his complaint was recorded at Surendranagar hospital, however it was a noon time. According to him, it has not happened that the deceased was beaten with stick on the head. Likewise, it has not happened when A1 inflicted stick injury on the head of the deceased. He did not see any Harijan near the incident nor it has happened when the incident took place in presence of all other persons and all having intervened. He has specifically stated that A1 started quarrel with regard to cow and not buffalo. He denied the suggestion that complaint ex. 23 was given to the police by other Shepherds and he simply put his thumb mark.

11. On closed scrutiny of the evidence of informant Savabhai, it clearly appears to us that he is not a truthful and reliable witness. We have our own doubt regarding his presence when the incident happened. In view of his own admission, namely that, his house is not situated at the out-skirt of the village where the incident had taken place and that his house is situated about 1000 to 1500 ft. away from the scene of the offence and in view of his further admission that for the purpose of reaching to the scene of offence, he had to pass through their land leading to road of Sudamada-Ranpur, there was no reason for him to go to the place where the incident took place and that too in the early hours of the morning. As stated above, the defence have successfully brought out the material contradictions in his cross-examination. In his complaint ex. 23, he has stated that A1 was carrying stick and he inflicted a blow on the head of the deceased, while in his evidence, he has stated that A1 gave iron pipe blow on the head of

the deceased. Thus, he changed the weapon used by A1. In his FIR, he has mentioned the presence of Bharavad Ruda Mera PW-7, while in his examination-in-chief, he has specifically stated that PW-7 came after accused ran away. Thus, as per his evidence, PW-7 has not witnessed the entire incident. In his FIR, he has stated that he intervened and prevented the deceased from being beaten further, while no such story of intervening and preventing the accused to beat the deceased is there. Even though, in his evidence, he has stated that he had a stick, he could not do anything to prevent the deceased from being beaten, his conduct is quite unnatural. Deceased being his cousin brother, it is expected fromhim to intervene and/or to shout for help, instead of standing and watching and doing nothing. In his complaint, he has stated that the incident started as deceased was not grazing the buffalo of A1, while, he came out with entirely a new story by bringing cow and also advised A1 to control cow by tying wooden log with rope between four legs of the cow. Admittedly, he is the first cousin of the deceased and, therefore, closed relative and interested person. We have, therefore, examined his evidence minutely. In view of material contradictions as stated above, his evidence does not inspires confidence. In our opinion, his presence itself at the time of incident appears to be a doubtful proposition. Even though he has stated in his evidence that Vela Masharu who is the first cousin of the deceased though came there at the spot, has not been examined by the prosecution. He did not send Vela Masharu to inform the family members of the deceased though the house is situated in the nearby area. Not only that, he did not give the name of the assailants not only to Vela Masharu but also to the persons who gathered there. This conduct of his, is quite unnatural. According to him, he informed about the incident to one Khodabhai Gugabhai, however, prosecution choose not to examine him. Even while informing Dr. Kharod of Surendranagar hospital, he did not give the entire details to him and simply stated beating on account of grazing of cow. The fact about utterance to A2 namely that 'today he is saved', has not been stated in his evidence.

The above conduct and discrepancies about the evidence of PW-1 Savabhai who claims to be the eye witnesses make him unreliable witness.

12. The evidence of PW-7 Ruda Mera Ex. 32, is also required to be rejected. He has been examined as a person who has witnessed the incident. However, as stated above by PW-1 in his evidence that PW-7 came after

the accused ran away, his presence at the time of the incident is not established by the prosecution. According to him, on the day of the incident, he after having his breakfast, when he was on his way to his 'vadi', he saw the quarrel between A1 and the deceased regarding grazing of buffalos. According to him, deceased refused to graze the cattle of A1, A1 inflicted stick blow on the head of the deceased. The deceased fell down at the hedge of the vadi of Shivkubhai and blood was oozing out of his mouth. He had accompanied PW-1 and deceased up to Ahmedabad hospital, thereafter, he returned and did not know what happened thereafter.

He has admitted in the cross-examination that he did not go to the house of Khetabhai to inform his family members nor he sent any person who gathered there to inform the brother of the deceased or other family members. His conduct is thus quite unnatural. By not informing anybody about the incident to the persons who gathered there would further make his conduct unnatural. According to him, so many persons wanted to know as to who had beaten the deceased, he simply said that A1 caused injury. He has admitted that he did not know any persons who gathered there. He also did not know as to whether they belonged to his village or other village. Even though he returned from Ahmedabad, he did not go either to Sayala or Sudamada to lodge the complaint. He simply went to his house and slept. This, in our opinion, quite contrary to the conduct of the ordinary man. It is also clear from the fact that after returning from Ahmedabad, he did not even go to the house of the deceased or his brother to inform about the physical condition of the deceased when he was admitted in the V.S. Hospital, at Ahmedabad. The fact that he has admitted in his cross-examination that in his previous statement he has not stated that at the time of the incident he started to go to his vadi, we have got our own doubt as to his presence at the time incident. Even though surrounding area of the scene of theoffence is a resident area and Harijans and Kathis are staying and the people are moving around, this witness did not make any attempt to call for the help nor prevented deceased from being beaten by the appellants. He even did not try to run after the appellants to apprehend them after the incident. Even though at the time of the incident, according to him, he was carrying weapon like "Kharapiya", he did not make any attempt to save the deceased. He has admitted in his cross-examination that the deceased was his distant uncle. Thus, even PW-7, in our opinion, is not a reliable and truthful witness. PW-1 being only eye witness, does not get any

corroboration from PW-7. Thus, it would be too risky to rely on the evidence of sole eye witness.

13. The prosecution has examined one more witness namely Lagharabhai Masharu PW-6, Ex. 30, who is also the nephew of deceased Khetabhai. From his evidence, it appears that he was in his field at the time of incident and on coming to know about the incident, he had gone to village Nagadaka. There he came to know that Khetabhai was taken to Surendranagar hospital. He had gone there and saw the deceased in unconscious condition. His evidence, in our opinion, does not carry the matter any further.

14. Except the evidence of PW-1, PW-7 and PW-6 who are the closed relatives of the deceased, the prosecution for the reasons best known to it, did not care to examine any other independent witness though present. The above PWs have not remained consistent with their earlier versions and come out with entirely a new story while deposing before the court. Their conduct at the time of incident and after the incident is quite unnatural. It is, therefore, difficult to accept their oral version in view of the discrepancies referred above. In any case, no conviction can be based simply relying on their testimony.

15. Surprisingly, in the present case, the names of the accused are not disclosed immediately to the police. The police right from the begining were never informed about the names of the assailants till the offence was registered and have failed to get any information about the names of the assailants.In fact, it was total negligence about accused and the incident.

16. PW-9 Dr. Salil Pravinchandra Kharod Ex. 36, General Surgeon of C.U. Shah Medical Centre, Surendranagar, in his evidence has stated that at 10.15a.m. in the morning of 30.7.1999, Khetabhai Dhanabhai was brought to him in injured condition. On being asked the history about the injury, he was told that the injured was beaten with stick by Shantu Apbhai (A1). As stated above, the deceased was brought to the hospital by PW-1 Savabhai and, therefore, as per the evidence of Dr. Kharod, PW-1 must have given the name of A1. Dr. Kharod immediately passed on the information to the Surendranagar City Police Station which was recorded at 10.40a.m. in the station diary at ex. 57. Ex. 57 reveals that from the information conveyed on telephone by Dr. Kharod from the hospital that Khetabhai Dhanabhai of village Nagadaka of Sayala taluka was admitted for

treatment because of the injuries sustained on head with stick and his condition is not good. Head Constable Ranabhai Bharavad was entrusted the investigation. Had the name of A1 was given as the assailant to Dr. Kharod, he could have given the same to the Surendranagar City Police Station, however, station diary entry Ex. 57 does not show the name of A1 as the assailant. Dr. Kharod in his cross-examined has admitted that if the name of the assailant is given to him, the police is required to be informed. He has stated that he was not in a position to give reasons as to why he has not given the name of the assailant while conveying the information to the police. He has also admitted that in the medical certificate also he has mentioned the history of the injury and the name of the assailant. Ex. 37 is the certificate issued by Dr. Kharod, surprisingly, he has not mentioned the name of either of the assailants. In substance, certificate Ex. 37 as well as Vardhi ex. 57 do not refer the name of either of the assailants as the person who caused injury to the deceased. Dr. Kharod, as stated above, was not in a position to give any reasons as to why he has not mentioned the name of A1 - Shantu in the case history. Thus, it is clear that Dr. Kharod has stated the name of the accused for the first in the evidence. The fact remains that the name of A1 was not disclosed to Dr. Kharod when the injured was treated by Dr. Kharod.

17. As per the evidence of PW-1, the police recorded his complaint at Surendranagar hospital. Even though, in cross-examination he has stated that they reached the hospital at Surendranagar between 12.00 to 1.00 O'clock and thereafter left for Ahmedabad after half an hour and during that time the police has come. However, on the basis of the information received by Surendranagar City Police Station, vide ex. 57, wherein, time 10.40 hrs. is mentioned as the time of recording the information conveyed by Dr. Kharod, it is clear that the complainant must have reached before 10.40 hrs. at Surendranagar hospital. From the evidence of complainant, it further appears that the complaint was recorded by the police during noon hours. He was not sure about time. It appears that, the police on the basis of the information received, must have gone during noon time, in any case, before the complainant left for Ahmedabad. However, the aforesaid fact does not get support from any other evidence. Ranabhai Jagamalbhai PW-11 Ex. 46, Head Constable of Surendranagar City Police Station in his evidence has stated that on the date of incident i.e. 30.7.1999, he was Head Constable of Surendranagar City Police station. His duty hours starts from 20.00 hrs.

to 8.00a.m. of 31.7.1999. As per the instructions of P.S.O., he had gone to Surendranagar hospital during night time and found Khetabhai Bharavad in an unconscious condition. He enquired about the incident from Bharavad Savabhai Kanabhai and recorded his complaint at ex. 23. The evidence of this witness is quite contrary to the say of the complainant. The complainant in his evidence stated that his complaint was recorded during noon time on 30.7.1999, while, according to this witness PW-11, he had gone to Civil Hospital, Surendranagar during his office hours i.e. after 8.00 O'clock at night. From the evidence on record, when it is established that the deceased was admitted at V.S. Hospital, Ahmedabad on 30.7.1999, this witness PW-11 could not have seen deceased lying at C.J. Hospital, Surendranagar and could not have recorded the complaint ex. 23 as none of them was present at the Surendranagar hospital. Thus, the complaint ex. 23 appears to be a document created by the police. This witness PW-11 has an audacity to deny the fact that at the time on which he recorded the complaint, injured Khetabhai and complainant Savabhai were not there in the civil hospital. This speaks volumes about the manner in which the case was handled by this witness PW-11.

18. As the incident has taken place at village Nagadaka within the jurisdiction of Sayala Police Station, the so-called complaint ex. 23 recorded by the Surendranagar City Police Station was required to be forwarded to the said police station. Maknaji Khatraji Kotwal PW-10 Ex. 44, Head Constable of Sayala Police Station, in his evidence stated that he was on duty from 20.00 hrs. to 30.7.1999 as PSO of Sayala Police Station. As that time, Police Constable Ramesh Devajibhai of Surendranagar City Police Station came with complaint at 0.30 hrs. on 31.7.1999 for the purpose of registering the offence. He recorded the offence as CR No. 105/99. He, thereafter, entrusted the investigation to P.S.I. Shri O.C. Joshi.

He has admitted in his cross-examination that the timing of the receipt of the complaint was not mentioned. He has also admitted that even though he has mentioned CR Number in the margin, he has not signed the same. He has also admitted that he has not signed the acknowledgment of the receipt of the complaint. He has also admitted that in the complaint ex. 23, timings of recording the complaint is also not stated. Besides the complaint, no other papers were brought by the Police Constable Rameshbhai. The evidence of this witness PW-10 would clearly reveals that a show was created by the

Surendranagar Police to record the complaint. In absence of any timings of recording of the complaint, it is not possible for us to say that the complaint was recorded at a particular time. The fact that the complaint as per the say of Head Constable Rana Jagmal was recorded during night hours of 30.7.1999 at Surendranagar hospital and in view of the fact that at that time, complainant, was in fact not present in the hospital, it raises doubt that as to who passed on the information giving names of the assailants when complainant was not there at the hospital at Surendranagar and when the complaint was recorded as per the say of Head Constable Ranabhai. It is reasonable to infer that in absence of complainant, someone else must have given the complaint. This fact has been in fact suggested to the complainant in his evidence. In any case, the manner in which the complaint ex. 23 has been recorded by the Head Constable Ranabhai of Surendranagar Police Station which was sent for registering the offence at mid-night hours to Sayala Police Station raises serious doubt about the genuineness of complaint ex. 23. This is the only document wherein the names of both the assailants are disclosed. When the complaint ex. 23 itself is not free from doubt, it would be hazardous to rely on such document and to base the conviction. The ld. Trial Judge unfortunately has not examined the prosecution case from this angle and has erroneously convicted both the appellants. In any case, both the appellants deserve at least benefit of doubts.

18. For the reasons stated above, Criminal Appeal No. 467/2002 is allowed by setting aside the judgment and order of conviction and sentence dated 8.4.2002 passed in Sessions Case No. 75/1999 by the ld. Addl. Sessions Judge, Surendranagar. The appellant no. 1 - Shantubhai Apbhai Kathi, who is undergoing sentence is ordered to be released forthwith, if he is not required for any other offence. The appellant no. 2 - Ramkubhai Apbhai Kathi is on bail, his bail bonds stands cancelled.

Order accordingly. Fine if paid, be returned.

(KSHITIJ R. VYAS, J.)

(AKSHAY H. MEHTA, J.)

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